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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Bernard Zimmerman, Magistrate Judge

Ryan Zulewski, et al,)	
)	
Plaintiff,)	No. C11-5117 NC
vs.)	
The Hershey Company,)	
)	
Defendant.)	
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Julie Campanelli, et al,)	
)	No. C08-1862 BZ
Plaintiff,)	
vs.)	
The Hershey Company,)	
)	
Defendant.)	

San Francisco, California
Tuesday, January 10, 2012

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING

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1 Tuesday, January 10, 2012

4:05 p.m.

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3 **THE CLERK:** All rise. The Honorable Bernard
4 Zimmerman presiding. You're at the District Court, Northern
5 District of California.

6 Calling Civil Case Number 11-5177 and Case Number
7 08-1862, Campanelli versus The Hershey Company, Zulewski
8 versus The Hershey Company.

9 **THE COURT:** Counsel, let's --

10 **THE CLERK:** Counsel, please state your appearance.

11 **MR. MALLOY:** Good afternoon, Your Honor. Brian
12 Malloy for the Plaintiffs.

13 **THE COURT:** Mr. Malloy, good to see you again. And
14 do you represent the Plaintiffs in both of these actions?

15 **MR. MALLOY:** Yes, Your Honor.

16 **THE COURT:** All right. Who's on the line for the
17 Defendants?

18 **MR. PUMA:** Good afternoon, Your Honor. This is
19 Michael Puma from Morgan Lewis for Hershey Company.

20 **THE COURT:** All right. Anyone else on the line? I
21 think, Mr. Puma --

22 **MR. FEOLA:** Yes, Your Honor.

23 **THE COURT:** -- you may be new to this case?

24 **MR. PUMA:** I am, Your Honor.

25 **MR. FEOLA:** David Feola.

1 **MR. MALLOY:** Your Honor, David Feola, our co-
2 counsel, is also on the line.

3 **THE COURT:** All right.

4 **MR. MALLOY:** And -- and Thomas Brandi, who -- who is
5 lead counsel in Campanelli, and will also be in this case,
6 he's had an appointment that he could not change.

7 **THE COURT:** Well, what is this case? What is
8 Zulewski and exactly how does it relate to Hershey?

9 **MR. MALLOY:** Well, Your Honor, it was filed at the
10 end of October 2011, and at that time it was 12 -- and just --
11 just going back, the Campanelli case had to deal with
12 overtime --

13 **THE COURT:** Right.

14 **MR. MALLOY:** -- violations involving the -- the
15 retail sales representative position --

16 **THE COURT:** Uh-huh.

17 **MR. MALLOY:** -- at Hershey, and it was a collective
18 action. It was not a class action.

19 **THE COURT:** Uh-huh.

20 **MR. MALLOY:** And the parties resolved the claims and
21 the --

22 **THE COURT:** Well, it started, I think, as a class
23 action. As I remember, I didn't certify the class.

24 **MR. MALLOY:** Correct.

25 **THE COURT:** What I ruled was I would allow an opt-in

1 class, and then California people who was -- it was a small
2 handful -- they can simply opt-in. That was the most
3 expeditious way of resolving their dispute.

4 **MR. MALLOY:** Correct.

5 **THE COURT:** Okay. So how -- how is this claim
6 different?

7 **MR. MALLOY:** Well, Your Honor, it's the same,
8 really, overtime violations for the same position, except it
9 involves people who were not part of the Campanelli case.

10 After Campanelli was resolved -- it only applied to
11 the 120 people who opted into the case.

12 **THE COURT:** It's 130, if I remember correctly, but
13 yes.

14 **MR. MALLOY:** And so initially it was filed on behalf
15 of 12 people who --

16 **THE COURT:** Right.

17 **MR. MALLOY:** -- who were not part of that case.

18 **THE COURT:** Uh-huh.

19 **MR. MALLOY:** Basically, they -- I mean, I don't want
20 to waive any attorney-client stuff, but we were contacted, and
21 they wanted to assert their claims and --

22 **THE COURT:** Well, is this a different time period?

23 **MR. MALLOY:** Well, it would -- Your Honor, our --
24 our position is it -- this case would go back four years for
25 the Californians and three years for the RSRs.

1 These RSRs, Your Honor, they had not had their
2 claims adjudicated in Campanelli.

3 **THE COURT:** This is because they declined to opt-in?

4 **MR. MALLOY:** Correct.

5 **THE COURT:** Oh.

6 **MR. MALLOY:** Correct.

7 **THE COURT:** And now they want --

8 **MR. MALLOY:** They didn't --

9 **THE COURT:** And now they want another action?

10 **MR. MALLOY:** Well, now they want to assert their
11 overtime claims. In the notice that went out from this
12 Court --

13 **THE COURT:** Right.

14 **MR. MALLOY:** -- in Campanelli, it advised them that
15 there was this ongoing proceeding. That if you want to assert
16 your overtime claims, you had to affirmatively opt-in to the
17 case and sign and consent the join form.

18 And it -- the notice also advised them if they did
19 not want to join the case, they didn't have to do anything.

20 **THE COURT:** Uh-huh.

21 **MR. MALLOY:** So the case -- we had the opt-in
22 period. The opt-in period closed. We had motion practice.
23 We had rulings on various motions. We almost had a trial
24 and --

25 **THE COURT:** I remember that well.

1 **MR. MALLOY:** And -- and the case resolved on -- on
2 the eve of trial. And your -- your orders -- your orders --
3 in particular, your order granting the Plaintiff's motion for
4 summary judgment, it only applied to the 120 who had opted in.
5 And -- and the settlement that was entered into only applied
6 to the 120 who were part of the case.

7 **THE COURT:** Right.

8 **MR. MALLOY:** And so now there are these other RSRs
9 who -- who now want to assert their claims.

10 **THE COURT:** And this is some -- looks like there are
11 about 20 of them?

12 **MR. MALLOY:** There are 31.

13 **THE COURT:** 31 of them.

14 **MR. MALLOY:** Yeah.

15 **THE COURT:** Okay. Interesting. I don't know what
16 the law is. I -- the idea -- it doesn't seem to me like there
17 could sort of be infinite piecemeal litigation, but I guess I
18 don't know what the rules are.

19 But look, let me tell you why I wanted to talk to
20 you. I think we're getting maybe a little more further into
21 the merits than we need. I see the stipulation and -- and so
22 on, but you may or may not know that I'm retired, and I'm
23 sitting on recall because I wanted to finish up my caseload.
24 As of the first of January, I have 24 cases left on my consent
25 docket.

1 I -- my recall period expires June 1st. I'm not
2 sure what I'll do past June 1st, but I will not ask to be
3 recalled with staff, which is what I was, which is why I have
4 the staff because I do not intend to perform "substantial
5 service."

6 So I wanted to make sure you knew that because if
7 there's something I can do to help you in the next several
8 months, I'm certainly willing to do this, but if you're
9 basically -- the -- the Campanelli litigation took several
10 years, as I remember. I think you started before Judge
11 Brazil, so you've been through one retired magistrate judge
12 and that's how you got to me.

13 If I can help you in the next several months, I'm
14 willing to do it. If you are basically looking for another
15 litigation, I'm just wondering whether it makes sense for me
16 to relate these cases. You'd only have to start over again
17 before somebody else.

18 I don't know who you've been assigned to. Is
19 this --

20 **MR. MALLOY:** Magistrate Cousins.

21 **THE COURT:** Judge -- Judge Cousins. Well, you might
22 want to just start off with Judge Cousins.

23 **MR. PUMA:** (Inaudible - - due to simultaneous
24 colloquy.)

25 **THE COURT:** So I just wanted to make that

1 disclosure, and I don't know whether that will affect your
2 stipulation or not. They probably are related, in the sense
3 of our Local Rules on related case, but the whole purpose of
4 having related cases is to -- the efficient administration of
5 justice, and I don't know how efficient it would be to relate
6 this case to me. So that's what I wanted to tell you all.

7 Now, having said that, I don't know whether you need
8 to talk to your clients or you've already thought of this or
9 how you want to proceed, so I'll start with you, Mr. Malloy,
10 you're in the courtroom.

11 **MR. MALLOY:** Yeah. But, Your Honor, I -- I think
12 this case is the last -- the Campanelli matter took three
13 years.

14 **THE COURT:** Three years.

15 **MR. MALLOY:** Little -- little over three years. I
16 don't anticipate this case taking anywhere near that long.

17 I know Mr. Brandi and Mr. Puma have been conferring
18 about, you know, the use of certain discovery in the
19 Campanelli case for this case. And so there wouldn't have to
20 be, you know, massive document production and -- and disputes
21 concerning that or -- or depositions.

22 And -- and so as to length -- I mean, I -- I would
23 think the length would be much less than three years. I don't
24 necessarily know though if it would be six months.

25 **THE COURT:** Well, I can't -- you know, I actually

1 was exchanging emails with my Chief. We're trying to figure
2 out what will happen after June 1st. You get recalled a year
3 at a time, and the recall has to be approved by the circuit.
4 So I can -- I can offer no commitment as to what I will be
5 able to do after June 1st.

6 Mr. Puma, you've --

7 **MR. PUMA:** Yes, Your Honor.

8 **THE COURT:** You've been very patient listening to
9 us. Do you have any views on the subject?

10 **MR. PUMA:** Well, Your Honor, I -- I -- I talked to
11 Tom -- I talked to Tom Brandi quite a few times. We talked
12 about this situation, and -- and we understood that -- that
13 you may be retired and that that recall -- that was actually
14 why Tom indicated he had a dozen other cases related
15 originally.

16 When we then understood that you were still active,
17 we thought it made a lot of sense to be in front of you. And
18 I -- I -- I can just -- I can tell you is, like I told Mr.
19 Brandi, exactly what we're planning to do.

20 Next week we're planning to answer the complaint,
21 file a motion to deny certification under the California State
22 law claims for largely the same reasons, and some additional
23 reasons now that your -- Your Honor identifies the basis for
24 this in the order last time.

25 And I think that Mr. Brandi is intending to in the

1 near future move for conditional certification, which is the
2 motion that you addressed last time. And we've already
3 started talking about that motion.

4 And, you know, I've raised some of the same concerns
5 you have, Your Honor, that there were 500 plus people who got
6 noticed last time and chose not to opt-in, and I started doing
7 research on it. It's an interesting issue, but I don't
8 believe that you can just keep peppering people with notices
9 until they finally choose to opt-in.

10 That -- but -- but that -- that's something that we
11 started about and, you know, maybe there could even be an
12 agreement on notice that people who are new hires since the
13 last notice, and we're trying to work those issues. We've
14 talked about discovery and streamlining that process and
15 potential early ADR.

16 So I think there could be a lot that could happen in
17 the short term, particularly with those two motions, and
18 figuring out where we are with the state law claims and who,
19 if anyone, would be getting notice that I think would, you
20 know, maybe position the case to move along quickly.

21 And that's why, even knowing the situation -- and
22 when I talked to Tom last night, not showing -- not knowing of
23 how long you would be sitting on the bench, Your Honor, we --
24 we thought that -- at least his view at the time was, and my
25 view, was that it -- it probably still makes sense to -- to be

1 in front of you.

2 **THE COURT:** Well, I'm willing to give you whatever
3 time I can. I suppose if when motions are filed, I'm not in a
4 position to deal with them, I guess I can talk to you at that
5 point about reassignment.

6 I will say this. I don't -- I'm just thinking again
7 out loud. Unless there's been some intervening change in law,
8 which I'm not aware, it's not clear to me why my view on the
9 state class would be any different than it was last time.

10 If anything, it would even be more so because I
11 think then -- I mean, whatever the number is that was in the
12 state class -- I remember it being a comparatively small
13 number -- it's going to be less now because presumably some of
14 the California folks were part of a hundred and -- and -- I
15 thought it was 30, but 120, whatever the number was that wound
16 up opting in. I have a recollection that maybe 20 some were
17 California residents?

18 **MR. MALLOY:** I -- I -- I think you're correct.

19 **MR. PUMA:** You know, Your Honor, it is a small
20 number. That's part of the motion. I mean, part of the
21 motion is just recognizing the same reasoning that you had in
22 your prior order. Part of it is *Smith v. Bayer* and courts
23 respecting prior certification decisions.

24 But it's -- also, it is -- I mean, we offer the
25 argument that, you know, it's difficult to say that joinder is

1 impracticable to such a small group where 30 people have
2 already joined their claim, so -- but we'll -- I started
3 talking to Tom about that. We'll -- we'll tee that all up.

4 **THE COURT:** All right.

5 **MR. PUMA:** I think that, you know, that can be
6 addressed by the Court maybe relatively early, and I think
7 there was going to be a motion for additional certification
8 relatively early is -- is what I'm hearing.

9 **THE COURT:** Okay. Well, look, as far as I'm
10 concerned, if I can help you in the few months that I know
11 that I will continue to be a judge, I'm willing to try. I'll
12 go ahead. I'll sign the certification order.

13 If it turns out that you wind up asking for things
14 that I don't think I can, you know, deal with in -- in the
15 time I have, then at that point I would simply ask that this
16 matter be reassigned.

17 It's conceivable that when I get -- as I say, I've
18 been talking to the Chief Judge, or I've been trying to talk
19 to the Chief Judge, to kind of explore what the options will
20 be come June 1st, but I -- one option that I'm not prepared to
21 explore is -- because I know it won't happen -- is a -- is the
22 -- we have -- there are various levels of recall, depending on
23 what you are prepared to commit to do.

24 To -- to get staff, you need to basically be
25 prepared to do a lot of work, and I -- I was willing to do

1 that to finish up my caseload. I -- I was telling my staff I
2 think I've tried more cases on recall into the year, you know,
3 on a -- on a -- on a relative basis than before.

4 So they've been (inaudible) to clean up your
5 calendars just -- now as you're about to leave, I mean, it all
6 comes out. And I've got a couple more left that I have to
7 try. I have another trial schedule in about three weeks, but
8 I'm not going to do that again.

9 Now, there are options short of that, but I don't
10 know whether I'd be in a position to give you the kind of
11 commitment or have the resources available to stay with this
12 case for, you know, a long -- a much longer period of time.

13 But I'll -- but as long as you understand what my
14 restrictions and limitations are, I'll go ahead. I'll get it
15 recalled -- I'll get it related. And -- and then if it turns
16 out that I'm not of much help to you, I'll just at that point
17 ask that it be reassigned. Okay?

18 **MR. MALLOY:** Okay.

19 **THE COURT:** All right.

20 **MR. PUMA:** Thank you, Your Honor.

21 **THE COURT:** I think you submitted a proposed order?

22 **MR. PUMA:** We did, Your Honor.

23 **THE COURT:** If you didn't -- if you didn't, I can
24 deal with it. And -- and I look forward to being of whatever
25 help I can.

1 **MR. MALLOY:** Thank you.

2 **MR. PUMA:** Thank you.

3 **THE COURT:** We're adjourned.

4 **MR. FEOLA:** Thanks a lot.

5 (Proceedings adjourned at 4:21 p.m.)

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4 **CERTIFICATE OF TRANSCRIBER**
5

6 I certify that the foregoing is a true and correct
7 transcript, to the best of my ability, of the above pages of
8 the official electronic sound recording provided to me by the
9 U. S. District Court, Northern District of California, of the
10 proceedings taken on the date and time previously stated in
11 the above matter.

12 I further certify that I am neither counsel for,
13 related to, nor employed by any of the parties to the action
14 in which this hearing was taken; and, further, that I am not
15 financially nor otherwise interested in the outcome of the
16 action.

17 *Stay Wagner*
18 _____

2/13/2012

19 Signature of Transcriber Date
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